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P. Rob Gairdner 4th March 1766.
Lo Strichen's

FEBRUARY 28, 1766.

Unto the Right Honourable the Lords of Council and Session,

THE PETITION OF

ROBERT GAIRDNER, Esq; late Commissary of the Army in *Scotland*,

Humbly sheweth,

THAT *George Pitcarne*, Merchant in *Edinburgh*, was appointed Treasurer to the *Trinity Hospital* there, by the Magistrates and Town-council of *Edinburgh*, who are Governors and Administrators of the Hospital, which Office he accordingly entered upon, agreeable to the usual Practice at that Time, without finding Caution, and even without granting any regular Obligation to account.

The Treasurer of a neighbouring Hospital having, in a short Time thereafter, unexpectedly failed in his Circumstances, greatly in arrear to the Hospital, the Magistrates, in order to silence the Clamour of the Citizens, which was loudly raised against them upon that Occasion, were obliged to lay down a Resolution, that, in all Time coming, the Persons whom they intrusted with Offices of that Kind, should be obliged to find sufficient Caution for their due and faithful Administration.

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Accordingly, as appears from the Minutes of Sederunt of the Governors, Mr. *Pitcarne*, in order to comply with this newly adopted Reſolution of the Magiſtrates, made a Propoſal to them, of this Date, of finding Caution for his Intromiſſions, as Treaſurer to the *Trinity Hoſpital*, to the Extent of 400 *l. Sterling*; and this Propoſal having been accepted of, the Petitioner, who did not apprehend the leaſt Danger in becoming bound for his Friend Mr. *Pitcarne*, as he well knew it would be in his Power to take a particular Inſpection of that Gentleman's Management, in Time coming, and to take care that his Accounts with the Hoſpital ſhould always be examined and cleared within a proper Time, which was ſpecially provided for, was therefore prevailed upon to join with him in a Bond to that Effect, granted to the Magiſtrates of *Edinburgh*, Adminiſtrators of the *Trinity Hoſpital*, upon the 9th of *March* 1764.

Feb. 29, 1764

A few Weeks after the Date of this Bond, Mr. *Pitcarne* having very unexpectedly become bankrupt, his Accounts, as Treaſurer, were, for the firſt Time ſince his Entry to the Office, ſtated and examined by the Governors, on the 11th *June* 1764, and it was then found, that, by a too ordinary Negligence and Inattention of the Managers, in never having regularly called him to account, he ſtood indebted to the Hoſpital, at the Time of his Failure, in no leſs a Sum than 447 *l. Sterling*.

April 3, 1764.

Upon making this Diſcovery, the Magiſtrates, in order to remedy the Effects of their own Miſmanagement, came to a formal Reſolution, of demanding the full Sum of 400 *l.* from the Petitioner, although almoſt the whole Balance aroſe from Intromiſſions of *Pitcarne*, prior to the Date of the Bond of Caution.

The Petitioner conceiving himſelf to be only bound for the Intromiſſions poſterior to the Bond, refuſed to comply with this exorbitant Demand, at the ſame time offering Payment of every Halfpenny the Governors could inſtruct *Pitcarne* to have intromitted with after the Petitioner's becoming Cautioner.

Cautioner.—This the Magiſtrates, after allowing the Matter to lie over till the 17th *May* 1765, refuſed to accept of, regiſtrated the Petitioner's Bond, and threatned to proceed to a Charge and ultimate Diligence for the 400 *l.* which obliged him to offer a Suſpenſion.

It would be Preſumption in the Petitioner to pretend to dictate to Perſons ſo well appointed with Counſellors and Adviſers as the Magiſtrates of *Edinburgh*; but he cannot help thinking, that a Charge for a liquidate Sum, upon an indefinite Obligation, was a Step ſomewhat extraordinary.—He conceives the proper Method of Procedure would have been, firſt, to conſtitute their Charge judicially againſt Mr. *Pitcarne*, and to have diſcuſſed him as the Principal, before attacking the Cautioner.—In place of this they thought proper to make up the Accounts, and ſtrike the Balance *ex parte*, without once ſubjecting them and the Vouchers to the Peruſal of the Petitioner, whom they pretend to be ſo deeply intereſted, nay, without even uſing the Formality of making *Pitcarne* ſign the Accounts, or acknowledge the Balance to be juſt.—And, having thus made up what Balance they pleaſed, they proceed inſtantly to charge the Petitioner for a ſlump Sum of 400 *l. Sterling*. It is needleſs, however, for the Petitioner, to enter further into theſe Particulars at this Time, and he hopes your Lordſhips Judgment, upon the Defences he is to offer againſt the Demand in general, will prevent his ever having occaſion to do ſo.

The Bill of Suſpenſion was paſſed by the Lord *Strichen* Ordinary, and, upon Application of the Chargers, it having been remitted to his Lordſhip to diſcuſs the Reaſons of Suſpenſion ſummarily upon the Bill, his Lordſhip, after hearing Parties, was pleaſed, of this Date, to find the Letters orderly proceeded, and to decern. Dec. 18, 1765.

A Repreſentation having thereafter been given in by the Petitioner, and Anſwers thereto upon the Part of the Chargers, his Lordſhip was pleaſed to "refuſe the Deſire of the Repreſentation, and adhere to his former Interlocutor." Feb. 15, 1766.

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The Petitioner, therefore, is now laid under the Neceſſity of applying to your Lordſhips for a Review of this Judgment; and as he is conſcious to himſelf, that when he ſubſcribed the Bond in queſtion, he had not the moſt diſtant Intention of binding himſelf for any Arrears which Mr. *Pitcarne* might have incurred previous to that Date, ſo he hopes to ſatisfy your Lordſhips, from the Intention of Parties, and from the Words of the Bond itſelf, that, in fact, he is not bound for theſe Arrears.

As almoſt the whole of this Diſpute turns upon the Interpretation of the Bond, which was granted on the 9th *March* 1764, by Mr. *Pitcarne* as Principal, and the Petitioner as Cautioner, in Manner above mentioned, it will be proper to recite the Bond itſelf at full length, and it is as follows:

" KNOW ALL MEN by theſe Preſents, Me *George* " *Pitcarne*, Merchant in *Edinburgh*: WHEREAS the Lord " Provoſt, Magiſtrates and Council, with the Deacons of " Crafts, Ordinary and Extraordinary, of the City of *Edin-* " *burgh*, Governors and Adminiſtrators of the *Trinity Hoſpi-* " *tal* there, by their Act of Council, dated the ſixth Day of " *January*, One thouſand ſeven hundred and ſixty-two Years, " elected me into the Office of Treaſurer to the ſaid Hoſpi- " tal: AND WHEREAS, I the ſaid *George Pitcarne* did, " upon the twenty-ninth Day of *February* laſt, propoſe to " give a Bond to the Extent of Four hundred Pounds *Ster-* " *ling* by myſelf, and *Robert Gairdner*, Eſq; late Commiſſary " to the Army in *Scotland*, as Cautioner for me, in Manner " after mentioned: WHEREUPON the ſaid Magiſtrates and " Council, with the Deacons of Crafts, Ordinary and Ex- " traordinary, did, upon the ſaid twenty-ninth Day of *Fe-* " *bruary* laſt, approve of the ſaid Propoſal, and did enact " and ordain, that in all Time hereafter, the Treaſurer of " the ſaid Hoſpital for the time being ſhall, within three " Weeks after his being elected into the ſaid Office, find " Caution, to the Satisfaction of the Magiſtrates and Coun-

" cil

" cil of the ſaid City, as Governors foreſaid, for his Intro-
" miſſions with the Revenue of the ſaid Hoſpital, THERE-
" FORE, I as Principal, and, with and for me, the ſaid *Ro-*
" *bert Gairdner*, Eſq; as Cautioner, do hereby bind and ob-
" lige us, conjunctly and ſeverally, our Heirs, Executors,
" Succeſſors, and Intromitters with our Goods and Gear
" whatſoever, that I, the ſaid *George Pitcarne*, ſhall make
" juſt Count, Reckoning and Payment, of the Rents and
" Revenue of the ſaid Hoſpital, to the Magiſtrates and
" Council of the City of *Edinburgh*, as Governors of the
" ſaid Hoſpital, ſo far as the ſame ſhall be intromitted with
" by me, and to pay over the ſame to the particular Uſes
" and Purpoſes, as is or ſhall be directed by the ſaid Go-
" vernors; and that the Accounts of the ſaid Hoſpital may
" be regularly cleared, I ſhall lodge all the Vouchers of my
" ſeveral Receipts and Payments, in the Hands of the
" Town's Accountant, within three Months after the Term
" of *Martinmas* annually, during my Continuance in the
" ſaid Office; and we, jointly and ſeverally, bind and oblige
" us, and our foreſaids, to make good all Deficiencies, to the
" Extent of the ſaid Sum of Four hundred Pounds *Sterling*, and
" that under the Penalty of Eighty Pounds Money foreſaid,
" of liquidate Expences, in caſe of Failzie, by and attour
" Performance, conſenting to the Regiſtration hereof in the
" Books of Council and Seſſion, Burgh Court-books of *E-*
" *dinburgh*, or others competent, that Letters of Horning,
" on ſix Days Charge, and all other Execution needful, may
" paſs on a Decreet to be interponed hereto, in Form, as ef-
" feirs; and thereto we conſtitute
" our Procurators. *In witneſs*
" whereof, we have ſubſcribed theſe Preſents, conſiſting of
" this and the preceeding Page, wrote upon Stampt-paper
" by *John Forbes*, Writer in *Edinburgh*, at *Edinburgh*, this
" Twentieth Day of *March*, One thouſand ſeven hundred
" and ſixty-four Years, before theſe Witneſſes, *James Kemp*

" and

" and *George Angus*, both Clerks to me the ſaid *Robert*
" *Gairdner*. Signed, *Robert Gairdner. Geo. Pitcarne. James*
" *Kemp*, Witneſs. *George Angus*, Witneſs."

The Diſpute reſolves entirely into a *quæſtio voluntatis*, *viz.* Whether was it meant by the Tenor of this Bond, that the Petitioner ſhould be liable to account for the Adminiſtration, and to make good all the Arrears incurred by Mr. *Pitcarne*, from the firſt Commencement of his Office, or only from the Period when he himſelf acceded as Cautioner?

In the *firſt place*, therefore, the Petitioner will humbly maintain before your Lordſhips, that, from the Nature of the Thing itſelf, when a Perſon binds himſelf, that another ſhall duly and faithfully adminiſtrate any Office conferred upon him, that Obligation, unleſs the contrary be expreſly ſpecified, muſt be held to reſpect only the Adminiſtration of that Office in time coming. It is not properly an Obligation to pay a Debt, that may have already been incurred. Upon the Part of the Cautioner, it is in effect an Obligation *ad factum præſtandum*, *viz.* that the Office ſhall be properly adminiſtrated, and a conſequential Obligation to make up any Loſs that may ariſe from Mal-adminiſtration. Thus it may often happen, that a Perſon continuing long in the ſame Office, may have had two or three different Sets of Cautioners, one after another, each of theſe Cautioners is bound for the Adminiſtration during his own particular Period; but it will not be pretended, that the Perſon who acceded laſt as Cautioner, will be bound for every Act of Adminiſtration, during the whole Continuance of the Office, even for thoſe Periods, when a different Cautioner was bound.

A cautionary Obligation is of its own Nature *ſtricti juris*, and will never be carried by Implication farther than what appears to have been the clear Intention of Parties. If therefore the proper and rational Intendment of a Perſon's becoming bound as Cautioner for one who has continued many Years

Years in the Office, muſt be preſumed *in dubio* to reſpect only the future Management thereof, it will be incumbent upon the Chargers to ſhow by what Part of the Bond, or by what other Evidence, they can make out, that the Purpoſe of the Petitioner's acceding as Cautioner for Mr. *Pitcarne*, ſhould be not only to give the Magiſtrates Security for his faithful Adminiſtration as Treaſurer to the Trinity Hoſpital in time coming, but likeways to render the Petitioner liable for every Farthing that Mr. *Pitcarne* had intromitted with of the Hoſpital's Funds, from the very Day of his being firſt elected into that Office. If they can point out no ſuch expreſs Declaration, your Lordſhips muſt certainly preſume that the Meaning of this Tranſaction was to ſecure to the Hoſpital the proper Adminiſtration of its Treaſurer, and the regular Payment of his Intromiſſions in time coming. Accordingly, the Petitioner has been informed, that when the Magiſtrates were exacting Caution from Mr. *Pitcarne*'s Succeſſor in this very Office, it being their Intention at that Time to have Security for the Intromiſſions which this new Treaſurer had had with the Funds of the Hoſpital ſeveral Months prior to his granting Caution, they took care to have the Cautioner bound for theſe alſo, by an expreſs Clauſe for that Purpoſe. So fully ſenſible were they that an Obligation upon the Cautioner, conceived in general Terms, would only reſpect the ſubſequent Management and ſubſequent Intromiſſions of the Treaſurer.

The Chargers have been pleaſed to repreſent the Nature of this Tranſaction in a very different Light. According to their Account of the Matter, the very Purpoſe and Intention of the Petitioner's becoming Cautioner for Mr. *Pitcarne* was, in order to ſecure a very conſiderable Arrear, which it was at that Time ſuſpected that Gentleman had in his Hands. The Petitioner cannot perſuade himſelf that this Account of the Matter is true, becauſe he apprehends it would imply ſomething

thing not altogether fair and honourable, upon the Part of the Magiſtrates. Had it really been with a View to ſecure ſome former Arrears already incurred, that the Petitioner was deſired to accede as Cautioner for Mr. *Pitcarne*, it would certainly have been proper and agreeable to that *bona fides* which ought to take place in all Dealings betwixt Man and Man, thoſe eſpecially which are entirely gratuitous upon one Part, that ſome Method ſhould have been taken to aſcertain this Balance, that the Account ſhould have been examined, and the Petitioner himſelf advertiſed of what he was doing. It is not pretended that any thing of this Kind was done: Not the ſmalleſt Hint was given to the Petitioner: No Arrear is ſo much as mentioned, either in the Propoſal made by *Pitcarne*, in the Act of the Governors, in the Bond itſelf, or in any one Part of the whole Tranſaction. Here therefore there muſt have been, if not a *ſimulatio falſi*, at leaſt a very ſtrong *diſſimulatio veri*, of which it cannot be ſuppoſed that the Magiſtrates of *Edinburgh* would have been guilty. Your Lordſhips will not believe, that ſo reſpectable a Body would endeavour, by concealing the moſt material Part of any Tranſaction, to enſnare a Perſon under the Countenance of two or three ambiguous Words, which would never draw any Attention, unleſs ſome ſecret Deſign was ſuſpected, to be bound for a much greater Sum than he ever intended. The Truth of the Matter is, and it is evident from the Security taken, that no Arrear was at that Time either meant or thought of by any of the Parties, otherways the Bond would undoubtedly have been conceived in a Form quite different. Mr. *Pitcarne* was reckoned to be a Man in very good Circumſtances, and the only Purpoſe of his finding Caution was, in order to comply with the Reſolution, which was about that Time formed by the Magiſtrates, of demanding Caution for the future from all Perſons whom they had truſted with Offices of that Kind. The Sum to which the Petitioner's Engagement is reſtricted, *viz.* 400 *l.* is of itſelf ſufficient

ficient Evidence of what he is here maintaining. The Revenue of the Hoſpital is, *communibus annis*, about 800 *l. Sterling*. Had the Governors thought of *Pitcarne*'s being upwards of 400 *l.* already in Arrear, and that he was immediately to have 800 *l.* more in his Hands, can it be imagined they would have allowed a Reſtriction to ſo ſmall a Sum as 400 *l.*—The Fact is, that as there was an expreſs Stipulation for an annual Clearance, Half a Year's Revenue was ſuppoſed as much as the Treaſurer would ever have at one Time in his Hands.—This is admitted by the Magiſtrates in their Anſwer to the Petitioner's Repreſentation; and, if he is not very ill informed, it is the general Rule they go by in taking ſuch Bonds.

The Petitioner can at leaſt ſay for his own Part, that it never once entered into his Thoughts, that the Magiſtrates had allowed Mr. *Pitcarne* to continue upwards of two Years Treaſurer to the Hoſpital, without making up and clearing his Accounts.—On the contrary, he imagined every thing was clear when the Bond was to be granted, and, conſequently he never once thought that he was binding himſelf for any Arrears. At the ſame time he cannot ſay he ever enquired, whether *Pitcarne* was in Arrear or not, becauſe, in the Obligation in which he was deſired to concur, he ſaw no ſuch thing mentioned from the one End to the other.

The Petitioner does in the next place maintain, that, ſo far as the Intentions of the Parties are to be gathered from the Words of the Bond itſelf, which are in all Caſes the beſt Interpreters of the Will, his Obligation is there clearly reſtricted to the future Management and future Intromiſſions of Mr. *Pitcarne*. The obligatory Clauſe of the Bond, your Lordſhips will have obſerved, runs in the following Stile: "That, I "the ſaid *George Pitcarne* ſhall make juſt Count, Rec"koning, and Payment of the Rents and Revenues of "the ſaid Hoſpital, to the Magiſtrates and Council of the "City of *Edinburgh*, as Governors of ſaid Hoſpital, ſo far "*as the ſame ſhall be intromitted with by me*, and to pay, *&c.*"

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Theſe laſt Words, as clearly as Words can do it, reſtrict the Obligation to the future Intromiſſions of Mr. *Pitcarne*. The Clauſe immediately following clearly demonſtrates the ſame thing; "and that the Accounts of the ſaid Hoſpital may be "regularly cleared, I ſhall lodge all the Vouchers of my ſeve-"ral Receipts and Payments in the Hands of the Town's Ac-"countant, within three Months after the Term of *Martin-"mas*."—If the Obligations contained in this Bond are to be held according to the Doctrine urged by the Magiſtrates, to extend to the Management of former Years, this laſt Part of it, *viz.* to lodge the Vouchers annually, *&c.* was already become impreſtable.

The Chargers have been pleaſed to lay great Streſs upon the following Words, towards the Cloſe of the Bond: "And "we jointly and ſeverally bind and oblige us and our fore-"ſaids, to make good all Deficiencies, to the Extent of 400 *l.* "*Sterling*, and that under a Penalty, *&c.*" From which they infer it to have been underſtood amongſt the Parties, that the Petitioner ſhould be liable, to the above mentioned Extent, for all Mr. *Pitcarne*'s Deficiencies, not only thoſe which he might afterwards happen to incur, but alſo thoſe which he had already incurred at any Time from the firſt Commencement of his Office.

Upon attending to the whole Strain and Tenor of this Bond, it is ſubmitted to your Lordſhips Judgment, what Force can be given to the concluding Words. The Bond now under conſideration runs nearly in the uſual Stile of Bonds, that are granted by any Perſon in Office alongſt with a Cautioner. The different Preſtations which are incumbent both upon the Principal and Cautioner, are therein fully and particularly enumerated. There is, 1*ſt*, An Obligation to make juſt Count and Reckoning to the Hoſpital; 2*dly*, To lodge the Vouchers of Payments, and Receipts, at a certain Period, annually in the Hands of the Town's Accountant; and,

3*dly*,

3*dly*, To make good all Deficiencies. The two firſt of theſe Preſtations reſpect chiefly the principal Debitor. The laſt belongs more properly to the Cautioner. The two firſt are in the Bond expreſly reſtricted to what Mr. *Pitcarne ſhall* intromit with; and the laſt, it is only ſaid in general, that they ſhall make good Deficiencies; but as theſe Words ſtand in connexion with, and referring to, the two former Clauſes, they muſt, according to the known and received Rules of Interpretation, be explained in a Conformity to theſe Clauſes: They muſt mean the Deficiencies ariſing from what *ſhall be* intromitted with, for which Intromiſſions alone the Obligation to make Count and Reckoning is conceived, unleſs it ſhall be pretended, that the Obligation to make up Deficiencies ſhall be held to extend to Intromiſſions, other than thoſe to which the Obligation to hold Count and Reckoning extends.

If this Clauſe, with regard to making up the Deficiencies, ſhall be regarded, not as merely referring to the two former, but as conſtituting of itſelf a diſtinct Obligation, and reſpecting a Period entirely different, *viz.* Mr. *Pitcarne*'s Intromiſſions prior to the Date of the Bond, one very extraordinary Conſequence muſt follow, that the Obligation of the Petitioner would in this Caſe be much broader than the Magiſtrates themſelves ſeem diſpoſed to maintain.—Upon this laſt Clauſe he would be obliged to make good the Balance at that Time, in the Hands of Mr. *Pitcarne*, to the Extent of 400 *l.* and, by the former Clauſe, obliging himſelf to hold Count and Reckoning to the Hoſpital, without any Limitation or Reſtriction whatſoever, he would be liable for the Intromiſſions of Mr. *Pitcarne* poſterior to that Date, to whatever Sum they might happen to amount.—A Propoſition, than which nothing can poſſibly be more oppoſite to the Intention of Parties at the Time of ſubſcribing this Bond, which evidently was, that, in all Events, the Petitioner ſhould never be liable for any thing beyond the Sum of 400 *l.* therein mentioned.

mentioned. The Magiſtrates themſelves have tacitly acknowledged this; for although Mr. *Pitcarne*'s Arrears are ſaid to amount to 447 *l.* they have not thought proper to demand from the Petitioner any thing more than the 400 *l.*—Here then is the tacit Confeſſion, that theſe laſt Words in the Bond do not conſtitute a diſtinct Obligation, but are meerly relative to the former Part thereof, and that, inſtead of extending the Petitioner's Obligation, the ſole Intention thereof was to reſtrict the general Clauſe, whereby he had become bound to hold Count and Reckoning for the Funds of the Hoſpital, a Clauſe which would otherways have no doubt rendered him liable for the whole Intromiſſions of Mr. *Pitcarne*, however great the Amount of them might be.

Another Conſequence will follow, no leſs extraordinary, That although the Intention of the Petitioner, in ſubſcribing the Bond of Cautionry, was evidently to procure for his Friend, Mr. *Pitcarne*, the Continuance of his Office, in which View alone it was, that he became bound for the faithful Adminiſtration thereof; yet, if this laſt Clauſe is to be held, to reſpect the Balance which was at that Time in Mr. *Pitcarne*'s Hands, if the Magiſtrates ſhould have thought proper, the very next Day thereafter, which they, no doubt, had a Power to do, and which even was an Event, by no Means improbable, amidſt the various Fluctuations of political Power between the contending Parties in this City, the Petitioner would nevertheleſs have remained liable to the full Extent of this 400 *l.* without having done the leaſt Service to his Friend.

Upon the whole, therefore, the Petitioner is conſcious to himſelf, that, when he ſubſcribed the Obligation in queſtion, what he had alone in View was, the ſubſequent Adminiſtration of Mr. *Pitcarne*. No prior Deficiency was at that time an Object under Conſideration; no State of Accounts was made up, in order to aſcertain the Arrears. The Fact is, That the Managers did not ſo much as know, that Mr.

Pitcarne

Pitcarne had incurred any Arrears at all. It muſt certainly be deemed extremely hard, if the groſs Negligence of theſe Managers, in never having called their Treaſurer to account in former Times, ſhall have the Effect of ſubjecting the Petitioner in Payment of ſo large a Sum, which was not in his View, and for which he had not any the moſt diſtant Intention of becoming bound. Whatever Intromiſſions Mr. *Pitcarne* may have had with the Funds of the Hoſpital, ſince the Date of his Bond, for theſe the Petitioner is ready to account to the full; but, to extend that Obligation farther, he apprehends, would be contrary, both to the Intendment of Parties, and to the ſtrict Words of the Bond itſelf, and would likewiſe, in a particular Manner, be repugnant to the Genius of our Law, which has been always averſe to the Extenſion of cautionary Engagements, in which the worthieſt Part of Mankind, Men of warm and friendly Tempers, are apt to be ſometimes too unwarily involved, and has, for that Reaſon, by a ſpecial Statute, ordained them to be cut off, by a much ſhorter Preſcription, than is ſufficient to extinguiſh any other Obligation.

MAY it therefore pleaſe your Lordſhips, to alter the Lord Ordinary's Interlocutor, and to find, that the Petitioner is only liable for Mr. Pitcarne's *Intromiſſions with the Funds of the Hoſpital, ſince the Date of his own cautionary Obligation; and therefore, to ſuſpend the Letters, except in ſo far, as the Chargers can inſtruct, that* Mr. Pitcarne *intromitted with the Funds of the Hoſpital poſterior to that Period.*

According to Juſtice, *&c.*

ROBERT BLAIR.

ROBERT BLAIR.